COPY

FILED
JUN 5 1954
HAROLD B. WILLEY, Clerk

Argued by
Merwin K. Hart, Jr.

Supreme Court of the United States

October Term, 1953.

No. ~~810.~~ 116

LEO H. BOHLING,
Plaintiff-Appellant,

against

EDWARD CORSI, Commissioner, and/or DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,
Defendants-Appellees.

Brief for Plaintiff-Appellant in Opposition to Appellees' Motion to Dismiss or Affirm.

MERWIN K. HART, Jr.,
Attorney for Plaintiff-Appellant,
196 Genesee Street,
Utica, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1954

Index.

Page

POINT I. Statement of the issues of this motion 1

POINT II. A substantial federal question has been presented by this appeal 3

POINT III. Section 562, subd. 1, of the Labor Law of New York State, providing for a continuation of a 2.7% pay roll tax for one full calendar year after the last year wherein employer employed four or more employees for at least fifteen days, violates the "equal protection" clause of the Fourteenth Amendment of the Constitution 9

POINT IV. The motion of the appellees to dismiss or affirm should be denied, and the case held for argument, on the merits 16

CASES.

Page

Belle's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, at 237 ..... 8, 9

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 ..... 5, 7, 11

Florida Central Railroad Company v. Reynolds, 183 U. S. 471, at 477 6

Grozzer v. Tiernan, 148 U. S. 657 at 662 6

Gulf, Colorado & Sante Fe R'd v. Ellis, 165 U. S. 150, at 155 ..... 6, 9

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 59, at 78 6

Matter of Kramer, 126 N. Y. S. 2d 433 14

Michigan Central Railroad v. Powers, 201 U. S. 245, at 293 6

Missouri Pacific R. Co. v. Castle, 224 U. S. 541 3

Missouri Railway Company v. Mackey, 127 U. S. 205 6

Near v. Minnesota, 283 U. S. 679, at 718 10

Rapid Transit Corp. v. New York, 303 U. S. 573 7

STATUTES.

Section 562, subdivision 1, of the Labor Law of New York State 2, 14

Section 202 of Workmen's Compensation Law 4

Argued by
Merwin K. Hart, Jr.

Supreme Court of the United States

OCTOBER TERM, 1953,

No. .....

LEO H. BOHLING,
Plaintiff-Appellant,

against

EDWARD CORSI, Commissioner, and/or DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,
Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

The appellant in the above entitled cause for his brief in opposition to appellees' motion to dismiss or affirm, respectfully shows the following:

POINT I.

Statement of the issues of this motion.

Because this brief is due ten days ahead of the return date indicated by the citation and order signed by the

Justice of this Court who allowed the appeal herein, and because there is some uncertainty as to whether or not our papers in support of jurisdiction will be printed and distributed to the Supreme Court when it decides this motion, we wish to bring to the Court's attention that the only relevant argument raised by the appellees herein in support of their motion to dismiss is their contention that "There is no substantial question presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States."

The defendants-appellees in their statement in opposition to jurisdiction have herein conceded that they have admitted the facts alleged in appellant's complaint, and denied the legal conclusions thereof.

The appellees comment on the finding of the Court of the first instance herein, as follows: "The requirement that a written application must be made before an employer once subject to the law is released from liability upon a finding that he has not employed four or more persons during the calendar year preceding the application is a reasonable one and conducive to the efficient administration of the law."

The appellant's objections to the validity of Section 562, subdivision 1, of the Labor Law of New York State have never been based on the requirement of a written application, but on the requirement of an extra year's liability for a tax after the conditions on which the tax is based have ceased to exist, before such an application may be entertained.

Since no application for termination of coverage, and no other administrative procedure has been set up providing for termination of coverage before the end of the extra year, the question as to whether or not the appellant filed a written application to cease coverage is im-

BLEED THROUGH POOR COPY

material to this case, unless the extra year's assessment is found to be constitutional.

This point seems to have been recognized by the Court of first instance, in that most of his discussion was devoted to the question of the constitutionality of the extra year's liability.

POINT II.

A substantial federal question has been presented by this appeal.

To succeed on this motion, the appellees must show that the question presented by this appeal is not a "substantial" federal question.

What is meant by a question that is not "substantial" was stated by this Court in the case of *Missouri Pacific R. Co. v. Castle*, 224 U. S. 541, as follows: that "The questions here urged have been so plainly foreclosed by decisions of the Supreme Court as to make further argument unnecessary."

Most of the arguments of the appellees in support of their motion to dismiss or affirm appear to be addressed more to the merits of the case, rather than to the proposition whether or not the case raises a substantial federal question, the cases cited being the same, or holding similar to cases cited by appellant in his statement in support of jurisdiction.

The issue in this case is the validity of a provision of a tax measure that operates as follows: employers of four or more employees for fifteen or more days in a calendar year must pay a tax of 2.7 per cent on their pay roll. Employers of three or less are not required to pay. Em-

ployers of three or less whose pay roll rises to four or more for at least fifteen days in a calendar year, and then reverts to three or less, must pay the tax not only in the year that their pay roll strength is four or more, but the next calendar year after the last one wherein they were of a size sufficient to warrant tax liability.

Thus, liability for the remainder of a year, and for the next full year, is based on a previous status of the taxpayer.

This tax is an innovation in American tax law, a departure from a custom that has existed from time immemorial, of determining a taxpayer's liability for a given tax according to his actual status during the period of taxation, without regard to previous status. It operates as a hardship on small employers who are accordingly required to pay a substantial tax amounting to 2.7 per cent of what may be a nine thousand dollar pay roll; whereas, in the same year their competitors in the same business, same location, and of the same sized pay roll are not taxed. The sole distinction between those taxed and those not taxed is based on a past condition.

The fact that forty-one other states have a substantially similar measure in their unemployment insurance laws is an indication of the large number of persons that should be affected by this case. Moreover, in 1949, the New York State Legislature passed Section 202 of the Workmen's Compensation Law, incorporating into the Disability Benefits Law a similar means of continuing liability an extra year after the facts upon which liability was based ceased to exist, indicating that this case raises an issue as to the validity of a new means of levying tax that may be used extensively in the future.

The fact that in the seventeen-year history of this and similar statutes, no case involving their validity has

reached the Supreme Court, is explained by the fact that those affected, employers of three or less, when assessed an illegal tax of two hundred and forty-three dollars, are unlikely to have the resources to support an extensive constitutional litigation.

We know of no similar tax that has ever been imposed on the American taxpayer.

Since the appellees have cited the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, we also quote it as in accord with holdings of the Supreme Court on the question of "Equal Protection" and State taxes, and submit that it reads as follows (at p. 513):

> "In no case do appellees sustain the burden on them of showing that *there are no differences between the exempt employers and the industrial employers who are to be taxed, sufficient to justify differences in taxation.*" (Italics added.)

Thus, the *Carmichael* case actually holds that the equal protection clause protects employers from taxes "where there are no differences between taxed and exempt employers"; the words "sufficient to justifying differences in taxation" meaning differences that are substantial and not trivial.

In the *Carmichael* case, all pay rolls of eight or more employers were taxed. An employer sought to invalidate the tax on the ground that the exemption of all the small employers was unfair to the larger ones. Thus, in the *Carmichael* case, there was no question of an extra year's liability. There, the small pay rolls, all those of under eight, were treated alike, whereas in the instant case, a small employer is being taxed while his competitors in the same situations are not.

The appellees herein further deduce from the *Carmichael* case the proposition: "The equal protection clause

of the Constitution does not impose upon the State any rigid rule of equality of taxation" (509). This the appellant concedes, if the word "rigid" is correctly defined. The Court's meaning of the above quotation is shown in the case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 59, at 78, as follows: "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because it results in some inequality."

This and similar cases merely show that this Court allows the State a wide margin of discretion in levying taxes, for the reason that it would be impossible for a government composed of human beings to levy a system of taxation that is perfect. These cases do not hold that states are bound by no rules of equality whatsoever. On the contrary, cases uniformly hold that a tax is not a violation of the equal protection clause so long as all persons in the same situation are treated in the same way.

In accord:

Florida Central Railroad Company v. Reynolds, 183 U. S. 471, at 477.
Michigan Central Railroad v. Powers, 201 U. S. 245, at 293.
Grozzer v. Tiernan, 148 U. S. 657, at 662.
Gulf, Colorado & Santa Fe R'd v. Ellis, 165 U. S. 150, at 155.
Missouri Railroad Company v. Mackey, 127 U. S. 205.

The crux of this case is that two employers, each employing three or less, one of whom has in the past employed four or more, are currently taxed differently; the difference being based on the past status of one of those employers—in short, they are not being treated the same way.

The appellees further cite the *Carmichael* case as holding "inequalities resulting from singling out any particular class for taxation or exemption do not infringe any constitutional rights."

In this case, the extra year's tax does not "single out any particular class," but actually imposes liability where others in the same class escape taxation.

The Court of first instance herein relied on the *Carmichael* case (*supra*) by quoting it at page 511:

> "Administrative convenience and expense in the collection or measurement of the tax alone are a sufficient justification for the difference between the treatment of small incomes and employers and that meted out to others."

We submit that the above quotation was used to uphold a tax on employers of eight or more, and exempting those of less than eight, and that the *Carmichael* case did not present an issue of different tax liability for those similarly situated, and is no precedent in support of a tax that is levied on large numbers of small employers, and not on others in the same situation.

The appellees further cite the case of *Rapid Transit Corp. v. New York*, 303 U. S. 573, in support of his contention that the question raised in this appeal is not substantial. That case contains little, if anything, relevant to this appeal that has not already been covered, yet we quote the following at page 580:

> "Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary business to warrant an imposition of a heavier tax burden."

Thus, even in this case, the Court stressed the fact that one taxpayer had an advantage over another kind of taxpayer sufficient to warrant a different treatment in taxation.

Most, if not all, cases involving an interpretation of the Equal Protection clause in relation to taxation, are instances where states laid taxes on certain occupations, businesses or concerns that were not laid on others that were at most superficially similar, but were in reality a different kind of taxpayer.

In *Belle's Gap Railroad Co. v. Pennsylvania,* 134 U. S. 232, at 237, this Court states that no general rule is possible regarding equal protection, in the following sentence:

> "It would, however, be impracticable and unwise to lay down any general rule or definition that would include all cases. *They must be decided as they arise.*" (Italics added.)

None of the cases cited refer to a tax such as this one, which prescribes an extra year's liability for a tax from which one's competitors in the same current situation are exempt.

There is no merit to appellees' contention that this appeal raises no substantial question, or that previous Supreme Court decisions preclude a hearing of the case.

POINT III.

Section 562, Subd. 1, of the Labor Law of New York State, providing for a continuation of a 2.7% pay roll tax for one full calendar year after the last year wherein employer employed four or more employees for at least fifteen days, violates the "equal protection" clause of the Fourteenth Amendment of the constitution.

Two generalizations can be made in regard to the power of a State Legislature to classify for purposes of taxation: First, the Legislatures are vested with a wide discretion; and, secondly, that discretion is limited by "reasonable limits" and "general usage." Thus, in *Gulf, Colorado & Santa Fe Railway,* 165 U. S. 150, at 155, the Supreme Court, discussing the validity of a State tax, said:

> "the question was presented as to the power of the State to classify for purposes of taxation, and while it conceded that a large discretion in these respects was vested in the various legislatures, THE FACT OF A LIMIT TO SUCH DISCRETION was recognized by the Court, by Mr. Justice Bradley, saying (in *Belle Gap Railroad v. Pennsylvania,* 134 U. S. 232): 'all such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature.'" (Italics added.)

That the provision of law requiring an extra year's liability after one ceases to employ four or more is unusual, is hardly open to question. Thus far, neither appellant nor appellees, after a presumably extensive research, has uncovered a similar tax law other than these forty-one state unemployment insurance laws, and the said New York Workmen's Compensation Law obviously copied from it.

It would seem that from time immemorial, there has been an understanding among attorneys and laymen alike, that taxes came due periodically, usually by the year; and that to determine liability, one compared one's current status with the rules then applicable. At all known times, a taxpayer would be surprised to learn that he must pay a tax that other similarily situated need not pay, simply because he had been liable in a previous and closed calendar or fiscal year.

The Supreme Court of the United States has stressed the importance of precedent in determining constitutional rights. Thus, in *Near v. Minnesota*, 283 U. S. 679, at 718, this Court stated:

> "The fact that for approximately 150 years there has been an almost entire absence of attempts to impose previous restraints on publication, * * * is significant of the deep-seated conviction that such a restraint would violate constitutional right."

While the argument of lack of precedent, standing alone, might carry small weight, in the presence of compelling public necessity, could any be shown to exist, yet when a means of taxation is completely novel, one should study its operation to ascertain why it has not been previously called into usage.

This provision of an extra year's liability affects only those employers of three or less whose pay roll jumps to four or more for fifteen days, and then reverts to its original status. These are the very small businesses; retailers, gas stations, diners, drugstores and, like the appellant, small contractors, i. e., those doing business on so small a scale as to be virtually glorified fellow-workers, rather than executives. They furnish vital services all over America, and provide large numbers of jobs.

In normal times business is highly competitive. The struggle to reduce overhead is continuous. A tax on one business and not on its competitor similarly situated at a given time is difficult to pass on to the consumer. It is an undue burden, and a discrimination. All state tax laws thus far sustained by this Court have been designed to operate equally on those in the same situation, and have been sustained on that ground.

The New York Supreme Court relied on the *Carmichael* case (*supra*) as holding that: "Administrative convenience and expense of collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others" (p. 511). It is submitted that this passage does not even by implication justify a tax on some small employers, while their competitors, currently similarly situated, do not pay it. The argument of administrative convenience has been used to support a tax and justify an exemption solely in cases where another method would mean prohibitive expense to collect a small return; it has never been used to continue liability after the facts on which liability has been based ceased to exist, for some sociological purpose of the government, or because the government finds it "convenient" to keep the taxpayer paying. Convenience of the government is an argument that can never be used to deprive citizens of fundamental rights.

For example, the thus far unreported segregation decision will create inconvenience to the tune of millions of dollars for those southern states which recently built schools relying on the theory of "separate but equal" facilities, and which now must revamp their systems to meet the supreme law of the land. Yet the Court seems not to have been influenced by such a consideration, in determining the rights of the school children concerned.

Certainly there is a legitimate scope to the doctrine of "administrative convenience," but it falls far short of holding that any tax is valid, so long as it is convenient to collect and administer.

The appellees justify this tax because, in their words:

> "It prevents a situation where an employee might be employed in covered employment for a short period of time and then be engaged in non-covered employment with resulting ineligibility for benefits in case he became unemployed. This carry-over provision insures that employees who have once become employed in covered employment will remain in that status for the remainder of the calendar year, in which the event causing the liability of the employer for the payment of these excise taxes occurred, and at least for the following calendar year."

The appellant does not dispute the good intentions of the framers of this law. Good intentions alone are not enough. Conceding that it is socially desirable to have as many employees as possible covered with unemployment insurance, that result must and in fact can be achieved by non-discriminatory means.

Even the acclaimed purpose of this extra year's liability is far from realized under the present law, since whenever liability ceases, the State must here, as in any other case, face the problems which inevitably arise when liability runs out. The novel expedient of requiring the taxpayer to pay for an extra year merely postpones an inevitable period when there must be some change and confusion.

Actually, there are other and more effective means of providing coverage for employees whose employers are no longer subject to tax liability. For one thing, since the percentage of employees apt to be left uncovered by unemployment insurance benefits, because their

employers are no longer liable, is such a small fraction of the total employed population subject to the tax, the reserve fund could easily be made to absorb the costs of protecting such workers. Of course, if and when the Legislatures amend the laws providing that all pay rolls, regardless of number of employees, will be taxed, the problem posed by this case would end; all workers would thus be covered, and their respective employers taxed in proportion to their annual pay roll; and the taxes would be passed on to the consumer.

The fact that the New York Legislature has already passed a statute, since this case was decided in the New York Court of Appeals, providing for taxing all pay rolls, regardless of size—said statute to become effective upon the passage of appropriate Federal legislation, is significant of the fact that this extra year's assessment has never been essential to a well-thought-out system of unemployment insurance.

A fundamental idea of all insurance is the creation of a fund against a rainy day, by the pooling of monies. This has proved sound in many fields as long as both the contributions and the distribution of benefits are fair and equitable.

The statute in question creates both an insurance and a tax. As a tax it is not voluntary; it is imposed. It must therefore be measured on some clearly defined basis —the usual, customary and accepted practice in this country is to assess taxes on some basis current to all taxpayers involved. To depart from this principle is to create a new theory of taxation.

We submit that the "equal protection" clause of the Fourteenth Amendment is not by definition or by judicial interpretation limited to protection in cases where the taxing authority has an evil motive against the tax-

payer concerned; that its scope includes any instance, such as the instant case, where a bizarre rule of law operates with obvious injustice against the taxpayer so as to strike at his very livelihood.

The very idea of presumed continuous liability, as defined in said Section 562, subdivision 1, of the New York Labor Law, is the novel proposition of the State saying: "We have them paying; we will keep them paying." That this notion leads to oppression on the part of the taxing power is almost self-evident; yet, we would like to cite a single instance of a case that resulted from the application of this law, *Matter of Kramer*, 126 N. Y. S. 2d 433. In the *Kramer* case, the taxpayer employed workers (students) who were covered until 1942, when the Legislature passed a statute exempting employers in so far as their employees were students. In 1951 the appellees herein sued to collect nine years' back taxes arguing that even though the Legislature passed a law exempting this particular class of employer, yet because Kramer had not filed an application, he still owed taxes for all intervening years. Kramer's defense was that he thought the law terminated his liability automatically. Although the Courts eventually relieved him from this oppressive assessment, it was only after he had undergone an extensive litigation in appellate courts.

While the State must be supported by laws providing appropriate penalties for wilful and negligent violators of our tax laws, this kind of statute tips the scales too far in the interests of the State against the citizen.

In an age that has seen an increasing percentage of our national income devoted to government budgets, the very idea of democracy becomes meaningless, if it does not include a minimum standard of fair play for the taxpayer; a reaffirmation of the Court's repeated holdings that "equal protection" means the same tax for all

in the same situation. Indeed, the policy of the Bureau of Internal Revenue, and all other enlightened tax collection agencies, has been a well-publicized policy of taking great pains to evolve tax laws that operate with fairness on all citizens. Each year sees new clauses that are designed to eliminate some measure of the law that seemed inequitable and unjust.

The provision of an extra year's liability based on past liability is a trap. If permitted to exist, it cannot be justified even on the ground of providing more employees with unemployment insurance benefits, because as more and more employers learned of this legal pitfall, they would go to great lengths to avoid a fourth employee, and in the long run fewer workers would be receiving the benefits of unemployment insurance.

Lastly, we submit that the cases laid down by this Court, from the time the Fourteenth Amendment was adopted, uniformly hold that the test of whether a tax law deprives a taxpayer of equal protection is whether or not others, similarly situated, are required to pay.

Here, there is no present difference between those taxed and those not taxed at all. A difference based on past history is not sufficient to justify differences in taxation. The idea is as startling as it would be to tax an owner of a bungalow on the basis that he had previously lived in a luxurious mansion.

Wherefore, appellant respectfully moves that the motion of the appellees to dismiss, or in the alternative to affirm the decision of the Court of Appeals of the State of New York be denied.

POINT IV.

The motion of the appellees to dismiss or affirm should be denied, and the case held for argument, on the merits.

Dated: Utica, New York, May 25, 1954.

MERWIN K. HART, Jr.,
Attorney for Appellant,
Office & P. O. Address,
196 Genesee Street,
Utica, New York.